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No. 03-701

In the

Supreme Court of the United States

JAMES S. and REBECCA DEATON,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF AMICUS CURIAE OF THE BEAVER DAM PUBLIC DRAINAGE ASSOCIATION AND JOHN A. RAPANOS IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A three-foot wide roadside drainage ditch runs alongside the property of James and Rebecca Deaton in rural Wicomico County, Maryland. The roadside ditch was built and is maintained by the county roads department and connects to a ditch system operated by a public drainage association established under state law to address local drainage problems. The Deatons dug a ditch on their property and, in doing so, disturbed an area the United States Army Corps of Engineers considers a wetland. There is no showing that common dirt—the pollutant at issue—left the Deatons's property, flowed into the roadside ditch, or reached any truly navigable waters.

The questions presented are:

1. Are the roadside ditch and the wetland next to it "navigable waters" under the Clean Water Act?

2. Where activity in a wetland has not degraded either a nonnavigable roadside ditch next to the wetland or a downstream traditional navigable water, does Congress's commerce power over navigation allow federal regulation of that wetland or that roadside ditch?

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INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37.2, the Beaver Dam Public Drainage Association (Beaver Dam) and John A. Rapanos submit this brief amicus curiae in support of James and Rebecca Deatons's petition for a writ of certiorari.[1] Written consent for amicus participation in this case was granted by counsel of record for all parties. Letters of consent have been lodged with the clerk of the Court.

Beaver Dam Public Drainage Association

Beaver Dam is one of over 100 public drainage associations (PDAs) on the Eastern Shore of Maryland empowered by state statute to regulate local "ditches, drains or canals" for the benefit of the public. *See* Md. Code Ann. art. 25, § 52(a) (2003). The primary purpose of public drainage associations is to develop plans for watersheds "for agricultural drainage and soil conservation to promote optimal crop production by establishing and maintaining watershed drainage systems conducive to public health, convenience, and welfare." *See* Md. Code Ann. art. 25, § 67(a) (2003). This type of land drainage is vital to Maryland's Eastern Shore agricultural economy and is needed to assure predictability of planting and harvesting. *See* Wayne H. Bell, Philip Favero, and Public Drainage Task Force, *Moving Water: A Report to the Chesapeake Bay Cabinet*, at 17 (2000), *available at* http://www.dnr.state.md.us/bay/tribstrat/public_drainage_report.pdf (*Moving Water*). An important goal of the Maryland Department of Natural Resources is to develop local strategies to protect property owners who depend on public drainage

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[1] Pursuant to Supreme Court Rule 37.6, amici affirm that no counsel for any party in this case authored this brief in whole or in part; and, furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

while also protecting environmental interests, such as wetlands, affected by public drainage. *Id.* at 1-2; Appendices B and C.

Beaver Dam oversees a network of drainage ditches in Wicomico County that is connected to the roadside ditch the Fourth Circuit found subject to federal regulatory authority under the Clean Water Act (CWA), 33 U.S.C. § 1251, *et seq.*, in this case. That determination undermines the State's soil and water conservation efforts and interferes with local land use management decisions. With its narrowly focused federal enforcement scheme, the CWA serves a different purpose than Maryland's public drainage program and does not consider or balance the competing environmental and economic interests State and local governments must address. The Fourth Circuit decision would effectively displace local water control programs with a conflicting federal scheme. Therefore, Beaver Dam has a direct interest in the outcome of this case.

John A. Rapanos

John A. Rapanos is an individual property owner who owns a 175-acre parcel in Williams Township, Michigan. This parcel contains isolated, nonnavigable, intrastate wetlands, on which Mr. Rapanos placed sand to enhance his property for sale and development. The nearest navigable water to Mr. Rapanos's land is the Kawkawlin River, approximately 20 miles away. Thus, the wetlands on Mr. Rapanos's property do not physically abut any navigable water.

Mr. Rapanos placed sand in the wetlands on his property without a federal permit. As a result, he was prosecuted by the federal government and convicted in 1995 of two counts of "discharging pollutants into waters of the United States" without a permit in violation of section 301(a) of the CWA. *See* 33 U.S.C. § 1311(a). Mr. Rapanos appealed his conviction on jurisdictional grounds, but the conviction was upheld by the Sixth Circuit. *United States v. Rapanos*, 235 F.3d 256 (6th Cir.

2000). This Court, however, granted Mr. Rapanos's writ of certiorari and remanded the case in light of *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*). *Rapanos v. United States*, 533 U.S. 913 (2001) (mem.).

Despite this Court's decision in *SWANCC* limiting the scope of the CWA to traditional navigable waters and adjacent wetlands, the Sixth Circuit followed the Fourth Circuit decision in this case and held that the isolated wetlands on Mr. Rapanos's property are subject to federal control. *United States v. Rapanos*, 339 F.3d 447, 448-49, 452-53 (6th Cir. 2003). Mr. Rapanos has filed another petition for a writ of certiorari to this Court asking for review of the Sixth Circuit's decision. *See Rapanos v. United States*, Docket No. 03-929. Mr. Rapanos's case raises federal jurisdictional issues identical to the Deatons's and to those raised in *Treacy v. Newdunn Associates, LLP*, 344 F.3d 407 (4th Cir. 2003), another case currently on petition to this Court for a writ of certiorari. *See Newdunn Associates, LLP v. United States Army Corps of Engineers*, Docket No. 03-637. Therefore, Mr. Rapanos has a direct interest in the outcome of this case.

STATEMENT OF THE CASE

In this case, the Fourth Circuit held that the federal government had jurisdiction under the Clean Water Act over a three-foot wide, nonnavigable, intrastate roadside drainage ditch and nearby wetlands. *See United States v. Deaton*, 332 F.3d 698, 702-03 (4th Cir. 2003). The ditch and road border a 12-acre parcel owned by James and Rebecca Deaton. *Id.* at 702. The Deatons bought the property to build a small residential subdivision. *Id.* To make the land suitable for residential building, they dug a trench to drain water to comply with state and local requirements for septic disposal systems. *Id.*

The government claimed that the trenching in this area of the property resulted in placement of fill into wetlands and was therefore subject to regulation under the CWA because the wetlands lie adjacent to the roadside ditch which the government characterized as a tributary to a distant navigable water. *Id.* The ditch flows intermittently via a thirty-two mile path along a twisting series of nonnavigable watercourses to the Chesapeake Bay. *Id.* The nearest navigable waterway is the Wicomico River about eight miles from the Deatons's property. *Id.* at 702. In exercising its putative jurisdiction, the government ordered the Deatons to stop developing their land and sued them to enforce the order. *Id.* at 703. The district court initially disagreed with the government's assertion of jurisdiction and granted summary judgment for the Deatons. However, the Fourth Circuit overruled the district court and remanded the case. *Id.*

While the remand was pending, this Court decided *SWANCC* in which it held that the Clean Water Act does not cover isolated, nonnavigable, intrastate waters. *SWANCC*, 521 U.S. at 172-74. But the district court read the decision narrowly and found that the Deaton property was subject to federal regulation under the CWA and must be restored to its natural state. *Deaton*, 332 F.3d at 711, 714. On appeal, the Fourth Circuit affirmed the district court decision concluding that federal regulation of wetlands not abutting a navigable water was authorized under the CWA and *SWANCC*. *Deaton*, 332 F.3d at 708-12. The court of appeals also affirmed the district court decision against the Deatons's Commerce Clause challenge. *Id.* at 705-08.

Relying on *Wickard v. Filburn*, 317 U.S. 111 (1942), the Fourth Circuit held that Congress could regulate all trivial discharges, like the discharge on the Deatons's property, because of the possible "aggregate effect" of such discharges on navigable waters. *Deaton*, 332 F.3d at 707. Based on that

determination, the Fourth Circuit concluded that federal regulation of nonnavigable waters, like the remote wetlands and the distant roadside ditch in this case, neither invoked the outer limits of the Commerce Clause nor upset the federal-state balance but fit well within the scope of the CWA and the power of Congress to protect navigable waters. *Id.* at 707-08.

SUMMARY OF THE ARGUMENT

The Fourth Circuit opinion in this case is at odds with the intent expressed in the CWA by Congress that federal regulation not impinge on state and local control over land and water use. In effect, the Fourth and Sixth Circuit's interpretation of CWA jurisdiction allows the federal regulatory scheme to displace state and local water and soil conservation programs that serve different goals, balancing competing local environmental and economic interests. This is in conflict with the Constitution's explicit preservation of distinct state and federal spheres. *See* U.S. Const. art. I, § 8 (enumerating the powers granted to the federal government); amend. X (stating "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the States, respectively, or to the people"). Therefore, this Court should grant the petition for a writ of certiorari to maintain the constitutional balance between federal and state power so necessary for the preservation of individual liberty. *See Gregory v. Ashcroft*, 501 U.S. 452, 458-59 (1991) (discussing the concept of divided sovereignty and finding "In the tension between federal and state power lies the promise of liberty.").

Moreover, the Fourth Circuit decisions in this case and *Newdunn*, and the Sixth Circuit decision in *Rapanos*, are in direct conflict with the Fifth Circuit decisions in *Rice v. Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001), and *In re Needham*, No. 02-30217, 2003 WL 22953383 (5th Cir. Dec. 16,

2003), regarding the extent of federal jurisdiction under the CWA. In *SWANCC*, this Court decided that federal jurisdiction under the CWA could not extend to isolated, nonnavigable, intrastate waters that do not abut a navigable-in-fact water. Were the CWA to be interpreted to reach so far, this Court found, it would call into question the Act's constitutionality under the Commerce Clause. Despite *SWANCC*, however, the Fourth and Sixth Circuits have interpreted the CWA to allow federal jurisdiction over isolated, nonnavigable, intrastate waters that do not abut a navigable water.

The Fourth Circuit also misapplied the so-called aggregation doctrine, which this Court limited in *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000). The lower court aggregated the effects of trivial, noneconomic, intrastate soil discharge activities to find a connection to navigable waters, and hence interstate commerce, that does not exist. This decision is representative of a growing trend among the lower federal courts of abusing the aggregation doctrine to extend federal jurisdiction over wholly intrastate, noneconomic activities with no meaningful connection to interstate commerce. Therefore, this Court should grant certiorari to address the misuse of the aggregation doctrine by the federal courts.

ARGUMENT

I

THIS COURT SHOULD GRANT THE PETITION BECAUSE THE FOURTH CIRCUIT'S DECISION ALLOWS A FEDERAL REGULATORY SCHEME WITH CONFLICTING GOALS TO DISPLACE STATE AND LOCAL REGULATORY PROGRAMS THAT SEEK TO BALANCE COMPETING ECONOMIC AND ENVIRONMENTAL INTERESTS

Land and water use are traditionally and primarily within the power of the states as a constitutional matter. *See SWANCC*, 531 U.S. at 174. Intermittent collections of non-navigable intrastate waters implicate local interests far more than national interests. States, such as Maryland, and their designated local authorities, such as Amicus Beaver Dam Public Drainage Association, have better knowledge of the function and value of isolated, nonnavigable, intrastate waters than the federal government. *See* Jonathan H. Adler, *Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Regulation*, 29 Envtl. L. Rev. 1, 51-52 (1999). Local entities can weigh the value of particular isolated, intrastate wetlands and waters against other important local values such as flood mitigation, drainage, crop irrigation, and public health. *Id.* Local regulatory programs, like those carried out by Maryland's system of public drainage associations, have been developed to regulate such waters to serve the economic and environmental interests of the state and its citizens. Effective local programs of this type should not be lightly displaced by a conflicting federal regulatory scheme.

Beaver Dam is one of several PDAs within Wicomico County and one of over 100 PDAs controlling and managing drainage to promote agriculture, protect land values, and improve public health. In 1964, property owners within a

discrete area of Wicomico County discovered their lands and livelihoods were being adversely affected by high ground water levels. Therefore, following Maryland law, they formed a citizens group and, after a four year study of the need for surface and ground water drainage in their area, petitioned Wicomico County to form the Beaver Dam Public Drainage Association. Md. Code Ann. art. 25, § 53(a) (2003). Beaver Dam's service area includes the land of 318 owners, encompassing 2,490 acres, drained by 7.74 miles of ditches. Land owners served pay assessments to Beaver Dam, which vary depending on the size of the parcel, and if unpaid become liens on their property. Md. Code Ann. art. 25, § 73 (2003). The assessments allow Beaver Dam to maintain its drainage system to control the watershed within its drainage area. *Id.*

Each PDA must have a watershed work plan and is controlled by a board of managers elected by property owners within the drainage area serviced by the PDA. Md. Code Ann. art. 25, §§ 58, 68 (2003). Thus, local property owners, such as the Deatons, within Beaver Dam's drainage area, are assessed a fee for the PDA's services and can hold the PDA accountable for problems caused by its management of the local watershed. Conversely, Beaver Dam—as a local entity with a discrete control area and a specific mission to manage the local watershed to promote agriculture, public health, and soil conservation, and to conserve natural resources and prevent pollution—is uniquely situated to respond to local problems. Md. Code Ann. art. 25, § 67(a) (2003); Md. Regs. Code tit. 15, § 20.01.01 (2003). *See* Jonathan H. Adler, *The Green Aspects of* Printz: *The Revival of Federalism and its Implications for Environmental Law*, 6 Geo. Mason L. Rev. 573, 577 (1998) (*Green Aspects*) (noting many state environmental programs pre-date federal schemes, which tend to conflict with the established state schemes' regulatory goals); Richard H. McNeer, *Nontidal Wetlands Protection in Maryland and*

Virginia, 51 Md. L. Rev. 105, 117 (1992) (arguing that state regulation of intrastate, isolated wetlands is vital to preserving such lands because the federal attempts under the CWA have not been effective); Stephen R. Rubin, Note, *An Analysis of Nontidal Wetland Regulation in Maryland*, 16 Va. Envtl. L.J. 459, 495-96 (1997) (noting Maryland is a leader in wetlands protection and that federal solutions for wetland preservation are not as effective as state schemes).

Maryland's local solutions for its local water problems serve a different purpose than the federal CWA, which is a centralized regulatory scheme to control the integrity of the "Nation's waters." 33 U.S.C. § 1251(a). Congress recognized this difference and acknowledged it in the Act. An explicit objective of Congress in promulgating the Clean Water Act was to "recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources." 33 U.S.C. § 1251(b). But, it has not worked out like that.

The Environmental Protection Agency and the Army Corps of Engineers, the agencies charged with enforcing the CWA, are committed to a "no net loss" of wetlands policy. Royal C. Gardner, *The Army-EPA Mitigation Agreement: No Retreat from Wetlands Protection*, 20 Envtl. L. Rep. 10337 (Aug. 1990); News Release, EPA, *Administration to Reaffirm Commitment to No Net Loss of Wetlands and Address Approach for Protecting Isolated Waters in Light of Supreme Court Ruling on Jurisdictional Issues*, Jan. 10, 2003, *available at* http://www.epa.gov/owow/wetlands/ANPRM-PRESS.pdf (accessed Jan. 22, 2004). This policy values preserving all wetlands in the United States and places little value on draining such lands. Gardner, 20 Envtl. L. Rep. 10337. The federal government regulates accordingly, requiring those property owners subject to federal jurisdiction to demonstrate that there is no "practicable alternative" to altering or filling a wetland.

40 C.F.R. § 230.10. The federal government's "no net loss" goal has created conflict with state programs in nearly every case in which property owners contest a federal wetland decision. Oliver A. Houck and Michael Rolland, *Federalism in Wetlands Regulation: A Consideration of Delegation of Clean Water Act Section 404 and Related Programs to the States*, 54 Md. L. Rev. 1242, 1253 (1995).

This case is an example of that conflict. The public drainage system in Maryland values draining what is predominantly farm land in order to facilitate timely planting and harvesting. *Moving Water*, *supra*, at 15, 29. Under *Deaton* and *Rapanos*, the federal government can displace this local program, and others, as both the Fourth and Sixth Circuits have allowed federal regulation of every wet place in North Carolina, South Carolina, Virginia, Maryland, West Virginia, Kentucky, Michigan, Ohio and Tennessee. Both courts found that control over navigable-in-fact waters meant federal regulation over "the whole tributary system" of such waters, as far upstream as the water flows, was permissible under the CWA. *Deaton*, 332 F.3d at 712; *Rapanos*, 339 F.3d at 452. Thus, expansive federal jurisdiction under the CWA intrudes into areas of traditional state concern and prevents states from balancing competing priorities such as the interests of conservation with those of economic development and prosperity. *See* Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 Harv. L. Rev. 553, 583, 630-32 (2001) (finding states are innovative in balancing such competing interests, acting where the federal government cannot or will not).

A decision from this Court that provides a clearer understanding of the limits of CWA jurisdiction will allow states the ability to continue to balance such interests. The Association of State Wetlands Managers found several states, including Maryland, provide considerable protection for "isolated intrastate waters" not subject to federal CWA

jurisdiction according to the limited interpretation of the CWA rejected by the Fourth and Sixth Circuits. Robin Kundis Craig, *Beyond* SWANCC, *The New Federalism and Clean Water Act Jurisdiction*, 33 Envtl. L. 113, 137 (2003). Other states, following *SWANCC*'s clarification of state and federal regulatory spheres with respect to wetlands, have acted to expand their water quality programs to specifically address isolated, nonnavigable, intrastate wetlands. *Id.*

Under the opinion below, local regulatory entities like Amicus Beaver Dam know that ultimately their decisions are subject to abrogation at the whim of the federal government. The incentive to develop long range plans to manage isolated, intrastate waters is greatly lessened. The central planning ushered in by the Fourth Circuit's decision in this case displaces local programs, like Maryland's PDA system, that regulate isolated, nonnavigable, intrastate waters in a manner that balances environmental and economic interests. Adler, *Green Aspects* 6 Geo. Mason L. Rev. at 577, 580-82.

In its zeal to enforce the Clean Water Act, the federal government has disrupted the delicate balance between state and federal power created by the Constitution to reduce the tyranny a central government would impose on individuals. *See Gregory*, 501 U.S. at 458. Centralized control over the citizens, lands, and waters of the United States was rejected by the Framers in order to preserve liberty. *See Printz v. United States*, 521 U.S. 898, 920 (1997); The Federalist, No. 45 at 292-93 (Clinton Rossiter ed. 1961). But the Fourth Circuit decision in this case shifts the balance of power to the federal government in a way that undermines local control of land and water use. If allowed to stand, the decision precludes a meaningful balancing of competing environmental and economic interests that only the state and local programs can accomplish.

II

THIS COURT SHOULD GRANT THE PETITION TO RESOLVE THE CONFLICT IN THE FOURTH, FIFTH, AND SIXTH CIRCUITS OVER THE SCOPE OF CLEAN WATER ACT JURISDICTION

In *SWANCC*, this Court concluded that federal regulation under the CWA of wholly intrastate wetlands not abutting a traditional navigable water was beyond the reach of the Act and could exceed the limits of federal power under the Commerce Clause. *SWANCC*, 531 U.S. at 172-74. Despite this, the Fourth and Sixth Circuits have found that federal jurisdiction could extend to isolated, intrastate, nonnavigable wetlands based on a tenuous and intermittent hydrological connection between the wetlands and navigable-in-fact waters. *See Deaton*, 332 F.3d at 702, 707-08; *Rapanos*, 339 F.3d at 449-53. Both circuits have concluded that federal regulation of a wholly intrastate wetland not abutting a navigable water fit "comfortably within Congress's authority to regulate navigable waters." *Deaton*, 332 F.3d at 705. *See Rapanos*, 339 F.3d at 452-53 (relying extensively on *Deaton*). In contrast, however, the Fifth Circuit has found, like this Court in *SWANCC*, that CWA jurisdiction extends only to navigable waters and waters adjacent thereto.

In *Rice v. Harken Exploration Co.*, 250 F.3d 264, an action was brought against Harken Exploration Company under the Oil Pollution Act (OPA) for oil spills on Rice's property in Hutchinson County, Texas. The OPA imposes strict liability on parties responsible for discharging oil into "navigable waters," defined as "waters of the United States." *Id.* at 266-67. Because of the similarity in language used in the OPA and the Clean Water Act, the Fifth Circuit relied on cases interpreting the term "navigable waters" under the CWA.

The Fifth Circuit began its analysis with *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), noting

that this Court had adopted an expansive reading of "navigable waters" under the CWA. *Rice*, 250 F.3d at 268. But the court concluded that under *SWANCC* this Court had more recently "limited the scope of the CWA." *Id.*

The Fifth Circuit observed that in *SWANCC*, this Court had "distinguished *Riverside Bayview Homes* on the ground that in that case the wetlands in question were adjacent to a body of open water that was actually navigable" and that the term "navigable waters" had to have some effect. *Rice*, 250 F.3d 264. Based on its reading of *SWANCC*, therefore, the Fifth Circuit declined to characterize a small seasonal creek as "waters of the United States" subject to federal regulation under either the Clean Water Act or the OPA, even though the creek flowed intermittently into the Canadian River, a "navigable water." "Instead," the court held: "[A] body of water is protected under the Act only if it is actually navigable or is adjacent to an open body of navigable water." *Id.* at 270.

More recently, the Fifth Circuit affirmed its holding in *Rice* and expressly rejected the Fourth Circuit's interpretation of CWA jurisdiction in this case, as well as the Sixth Circuit's interpretation in *Rapanos*. In *In re Needham*, 2003 WL 22953383, the Fifth Circuit was again required to determine the scope of "navigable waters" under the Oil Pollution Act and, as in *Rice*, the Fifth Circuit relied on *SWANCC* for its determination.

In *In re Needham*, the government argued that the definition of navigable waters "covers all waters, excluding groundwater, that have any hydrological connection with 'navigable water.'" *Id.* at *3. The Fifth Circuit noted that at least two appellate courts had agreed with this interpretation: the Sixth Circuit decision in *Rapanos* and the Fourth Circuit decision in this case. *In re Needham*, 2003 WL 22953383 at *3.

But the Fifth Circuit expressly rejected this interpretation, stating that the government's definition of navigable waters "is unsustainable" under *SWANCC*. *Id.* According to the court, the CWA and OPA do not permit the federal government to regulate "tributaries," including wetlands, that are neither navigable in fact nor adjacent to such waters. *Id.*

> Consequently, in this circuit the United States may not simply impose regulations over puddles, sewers, roadside ditches and the like; under [*SWANCC*] "a body of water is subject to regulation . . . if the body of water is actually navigable or adjacent to an open body of navigable water."

Id. (*quoting Rice*, 250 F.3d at 269.)

The Fifth Circuit went on to say that the interpretation of "navigable waters" suggested by the government—which had been adopted by the Sixth Circuit in *Rapanos* and the Fourth Circuit in this case—would push "the outer limits of the Commerce Clause and raise serious constitutional questions." *In re Needham*, 2003 WL 22953383 at *5, n.8.

III

THIS COURT SHOULD GRANT THE PETITION TO ADDRESS THE MISUSE OF THE AGGREGATION DOCTRINE BY THE LOWER FEDERAL COURTS EXEMPLIFIED BY THE FOURTH CIRCUIT'S APPLICATION OF THE DOCTRINE TO ISOLATED, NONNAVIGABLE, INTRASTATE WATERS

Against a Commerce Clause[2] challenge to federal CWA jurisdiction, the Fourth Circuit relied on the "aggregation doctrine" to authorize federal regulation of the sometime standing waters on the Deatons's property. The aggregation doctrine derives primarily from *Wickard v. Filburn*, 317 U.S. 111 (1942). Under *Wickard*, federal regulation of wholly intrastate noneconomic activities has been approved by the courts based on the purported effects such activities could exert on interstate commerce when aggregated.

In *Wickard*, the Court found that the federal government could regulate wheat grown on a farm for home consumption, even though such home-grown wheat by itself had a *de minimis* effect on interstate commerce. *Id.* at 128-29. The Court reasoned that federal regulation of growing and consuming wheat was proper because home-grown wheat in the aggregate was a large amount that could enter the market and have a "substantial influence on price and market conditions." *Id.* at 128. Under the aggregation doctrine, federal regulatory power under the Commerce Clause greatly expanded, allowing federal regulation of just about anything. *See* Richard A. Epstein, *Propter Honoris Respectum, Constitutional Faith and the Commerce Clause*, 71 Notre Dame L. Rev. 167, 188-89 (1996).

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[2] *See* U.S. Const. art. 1, § 8, cl. 3 (providing "The Congress shall have power . . . to regulate commerce with foreign nations, and among the several states, and with the Indian tribes;").

Two recent decisions of this Court, however, attempted to limit federal regulatory power under the Commerce Clause generally and *Wickard* specifically. In *United States v. Lopez* and *United States v. Morrison,* this Court invalidated federal laws that attempted to regulate wholly intrastate noneconomic activities that had, at best, only attenuated effects on interstate commerce. These cases both turned on the nature of the activity: "[A] fair reading of *Lopez* shows that the noneconomic, criminal nature of the conduct at issue was central to our decision in that case . . . . 'Even *Wickard*, which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity . . . . '" *Morrison*, 529 U.S. at 610.

In *Lopez*, this Court struck down the Gun Free School Zones Act because the regulated activity—possession of a gun in a school zone—had nothing to do with economic activity and did not substantially affect interstate commerce. *Lopez*, 514 U.S. at 551, 559-68. In *Morrison*, this Court invalidated provisions of the Violence Against Women Act that allowed victims of "gender-motivated violence" to sue in federal court. *Morrison*, 529 U.S. at 601-02; 627. This Court found that physical attacks by one person against another, a wholly intrastate activity, was not economic activity on its face and did not substantially affect interstate commerce and, therefore, could not be regulated by Congress under the Commerce Clause. *Id.* at 614-19.

Both *Lopez* and *Morrison* strongly affirmed that federal power under the Commerce Clause was limited in order to prevent the federal government from becoming one of general powers. *Lopez*, 514 U.S. at 559-68; *Morrison*, 529 U.S. at 617-19. These cases prohibit the federal government from aggregating noneconomic intrastate activities, like the filling of isolated, nonnavigable, intrastate waters at issue in this case, that have only an attenuated connection to interstate commerce

and obliterate the "distinction between what is truly national and what is truly local." *Lopez*, 514 U.S. at 567-68. But the lower courts fail to heed this Court's teachings in *Lopez* and *Morrison* that there are limits to the commerce power. The Fourth Circuit opinion in this case is a prime example of the lower court trend to apply the aggregation doctrine to find ever weaker links to interstate commerce to extend federal regulatory power.[3]

While granting that the Deatons's ditch digging activities were "too trivial to affect water quality in navigable waters," the Fourth Circuit found that Congress could regulate such activities because of their nationwide, aggregate effects. *Deaton*, 332 F.3d at 707. Although the aggregation doctrine is applied to establish a substantial effect on interstate commerce, the Fourth Circuit compounded its analytical error by relying on cases that have nothing to do with substantial effects. For example, the court relied on cases such as *Champion v. Ames*, 188 U.S. 321 (1903), in which this Court approved a federal law prohibiting the transport of lottery tickets in interstate commerce. *Id.* at 344-45. In *Champion*, the Court reasoned that Congress could prohibit the transfer of tickets in interstate commerce to prevent pollution of interstate commerce by immoral lottery tickets. *Id.* at 357-64. The Fourth Circuit analogized that keeping the channels of interstate commerce free from threatened, "immoral" uses was similar to regulating to keep the Wicomico River clear of any discharge generated by the Deatons's activities that may have entered the river, but only after passing through several nonnavigable channels. *Deaton*,

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[3] Jesse H. Choper, *Taming Congress's Power Under the Commerce Clause: What Does the Near Future Portend?*, 55 Ark. L. Rev. 731 (2003) (arguing that *Lopez* and *Morrison* will not seriously affect the current, extensive reach of federal power because the Court did not limit the aggregation doctrine and other devices for extending federal power over wholly intrastate activities).

332 F.3d at 707. *But see* Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 Va. L. Rev. 1387, 1442 (1987) (concluding that pre New-Deal era Commerce Clause cases such as *Champion* do not stand for the proposition that Congress can regulate any and all intrastate conduct that affects, however remotely, a channel of interstate commerce).

In this case, the record evidence shows that the Deatons's ditching activities did not affect a channel of interstate commerce. *See* Petition for Writ of Certiorari, No. 03-701 at 7-8 (discussing the lack of evidence that the Deatons's ditching activity would exert any effect, let alone a substantial one, on interstate commerce). In fact, the "effect" on commerce the Fourth Circuit found was attenuated at best and hypothetical at worst. *Deaton*, 332 F.3d at 702-03.

The Fourth Circuit's misuse of the aggregation doctrine to expand federal power over wholly intrastate noneconomic activities, like the discharge of soil into a wetland, simply proves Justice Thomas' point in his concurrence in *Lopez*. There, he noted a need to redefine the scope of federal regulation of intrastate activities under the Commerce Clause, finding that the "aggregation principle is clever, but has no stopping point." *Lopez*, 514 U.S. at 600 (Thomas, J., concurring). This case shows how a court "always can draw the circle broadly enough to cover an activity that, when taken in isolation, would not have substantial effects on commerce." *Id.* If this expansive interpretation of federal power under the Commerce Clause is upheld, then "every aspect of human existence" would be subject to federal control in contravention of the Constitution. *Lopez*, 514 U.S. at 600-01 (Thomas, J. concurring).

In the environmental context, some have taken the aggregation doctrine to this extreme, arguing that Congress can aggregate all endangered species to show a substantial effect on

interstate commerce because all species may have some yet unrecognized future value.[4] Arguments like this and the Fourth Circuit's application of the aggregation doctrine to isolated, nonnavigable, intrastate waters in this case to justify expansive federal control only seem plausible to some courts because of the doctrine's limitless nature.

If allowed to stand, the Fourth Circuit's decision would mean that federal regulatory power under the Commerce Clause is virtually unlimited. Just as the highly integrated nature of the national economy does not justify federal regulation of every intrastate activity that could possibly affect interstate commerce, *see Lopez*, 514 U.S. at 567; *Morrison*, 529 U.S. at 617-19, so a "hydrologically" connected aquatic system cannot justify federal regulation over isolated, nonnavigable, intrastate waters.

CONCLUSION

The Clean Water Act did not give the federal government the power to regulate every wet place within the United States. Congress explicitly preserved state control over land and water use and did not mean to displace state programs regulating isolated, nonnavigable, intrastate waters. These state programs serve different goals in order to accommodate competing local environmental and economic interests that the federal scheme does not.

The expansive federal control under the Commerce Clause countenanced by the Fourth Circuit in this case and *Newdunn*

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[4] *See* Arthur B. Mark, III, *Currents in Commerce Clause Scholarship Since* Lopez: *A Survey*, 32 Capital Univ. L. Rev. at _____ (forthcoming 2004) (reviewing scholarship discussing the status of federal environmental law after *Lopez* and *Morrison* and noting that some see the aggregation doctrine as the way to justify federal control under the Commerce Clause over wholly intrastate activities allegedly affecting the environment).

Associates, Docket No. 03-637, and the Sixth Circuit in *Rapanos*, Docket No. 03-929, displaces state control of local land and water issues. If the federal government is empowered by the CWA to regulate isolated, nonnavigable, intrastate waters and wetlands, then there is a serious question as to whether the CWA is a constitutional exercise of Congress's power under the Commerce Clause. The Fourth and Sixth Circuits, like many of the lower federal courts, misused the aggregation doctrine to extend federal power over noneconomic, intrastate activities that have no measurable effect on interstate commerce.

Moreover, the Fourth and Sixth Circuit decisions directly conflict with the Fifth Circuit over the scope of CWA jurisdiction. Therefore, this Court should grant the petition for a writ of certiorari.

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Respectfully submitted,

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